# DCPI 939/2021

[2023] HKDC 934

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 939 OF 2021

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BETWEEN

CHAN FUNG YU ANJI (陳豐裕) Plaintiff

and

HONG KONG SHENG KUNG HUI

WELFARE COUNCIL LIMITED

(香港聖公會福利協會有限公司) Defendant

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##### Before: His Honour Judge Andrew Li in Chambers

Date of Hearing: 15 June 2023

Date of handing down Decision: 7 July 2023

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DECISION

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*INTRODUCTION*

1. This is the defendant’s appeal against a master’s decision for an order made under Order 22, rule 20(1) of the Rules of the District Court (“the RDC”).
2. The core issue on appeal is whether there are exceptional circumstances which warrant the court to invoke the “otherwise proviso”, such that the plaintiff is liable for the costs after 27 January 2021, ie 28 days after the pre-action offer has been made by the defendant, for her common law claim.

*BACKGROUND*

1. The plaintiff was employed by the defendant as a cook. On 12 April 2018, she allegedly suffered a back injury while bending down to pick up a bin in the kitchen of Tsz Wan Shan Day Care Centre which was run by the defendant (“the Accident’).
2. On 28 March 2019, the plaintiff commenced employees’ compensation proceedings against the defendant (“the EC Action”). It was settled by a Consent Order dated 13 March 2020 for a sum of HK$280,000.
3. On 30 December 2020, the defendant offered HK$10,000 in full and final settlement of the plaintiff’s intended common law claim and costs (“the Pre-Action Offer”).
4. On 26 April 2022, the defendant made a sanctioned payment of HK$10,000 into the court (“the Sanctioned Payment”) which was inclusive of interest but not the employees’ compensation which had already been received by the plaintiff. The defendant indicated in a letter on even date that if the plaintiff accepts the Sanctioned Payment, the defendant shall invite the court to vary the costs order on the basis that the plaintiff should have accepted the Pre-Action Offer instead of commencing the PI action.
5. On 25 May 2022, after several rounds of without prejudice correspondence, the plaintiff rejected the Sanctioned Payment via letter and ultimately made a counteroffer of HK$125,000 plus costs. This was rejected by the defendant. The defendant stood firm on their Pre-Action Offer at HK$10,000.
6. On 25 October 2022, the plaintiff took out a summons under O 22 rr 15 & 20 of the RDC to accept the Sanctioned Payment at HK$10,000 out of time with costs to the plaintiff up to 28 June 2022, and no order as to costs thereafter (“the Summons”).
7. On 15 November 2022, Master Dominic Pun (“the Master”) granted leave to the plaintiff to accept the Sanctioned Payment out of time. Directions were given to the parties to file and serve affirmations and written submissions over the arguments on costs. The Master further directed that the matter will be dealt with by way of paper disposal without an oral hearing.
8. On 2 May 2023, the Master handed down a written decision (“the Decision”) and made the following order:-
9. The defendant do pay the plaintiff the costs of this action up to and inclusive of 28 June 2022 (ie the day which the Sanctioned Payment could have accepted without leave of the court), to be taxed if not agreed at the District Court scale; and
10. The plaintiff do pay the defendant costs of this action from 29 June 2022, including the costs of and occasioned by the Summons, to be taxed if not agreed at the District Court scale (“the Order”).
11. By way of a notice of appeal against the Decision dated 8 May 2023, the defendant appeals against §(1) of the Order on the basis that (i) the plaintiff’s claim is doomed to fail; and (ii) she should have accepted the Pre-Action Offer. The defendant also submits that the plaintiff should be penalized for costs for the lack of merits of her claim and her unreasonable behavior of rejecting the Pre-Action Offer but accepting the Sanctioned Payment, since (i) the plaintiff’s claim was doomed to fail due to insufficient evidential basis; and (ii) the amounts of the Pre-Action Offer and the Sanctioned Payment was materially identical such that the plaintiff should have accepted the former in the first place.
12. The plaintiff’s position is that (i) the court is not supplied with sufficient materials and it is not the court’s function to conduct a mini-trial of the discrepancies and credibility of the plaintiff raised by the defendant; and (ii) the Pre-Action Offer and the Sanctioned Payment are not identical since the former is inclusive of costs while the latter is not.

*APPLICABLE LEGAL PRINCIPLES*

1. Order 22, rule 20(1) of the RDC states:-

“(1) Where a defendant’s sanctioned offer or sanctioned payment to settle the whole claim is accepted without requiring the leave of the Court, the plaintiff is entitled to his costs of the proceedings up to the date of serving notice of acceptance, unless the Court otherwise orders.”

1. The above rule states that upon acceptance of the sanctioned payment, the plaintiff is entitled to his costs of the proceedings up to the date of serving notice of acceptance. But this *prima facie* rule may be displaced when the court orders otherwise when there are exceptional circumstances that clearly warrant a different costs order (“the Otherwise Proviso”). This is invoked by the defendant in this case with a warning to the plaintiff at the time of making the Sanctioned Payment that the defendant will apply to invoke the Otherwise Proviso.

*DISCUSSION*

1. *Doomed to Fail Point*
2. Although on the surface this case is still at a very early stage, I find that the court can still form a preliminary view on whether the claim should have been proceeded in the first place and it is a matter that falls within the court’s discretion.
3. It is the defendant’s case that there are two limbs to this point, relating to (i) the defendant’s credibility on whether her injury was caused by her act of lifting the bin; and (ii) the simple nature of the act of lifting the alleged 10kg bin, such that the plaintiff’s claim is doomed to fail.
4. The Master in §§41-42 of the Decision held that since there have not been exchange of witness statements and no discovery of documents, to form a preliminary view on the merits of the case would be tantamount to conducting a mini-trial on affidavits without sufficient materials.
5. Mr Leon Ho for the defendant clarifies that he is not asking the court to form a preliminary conclusion on the case, ie whether the defendant is wholly liable for allegations made by the plaintiff and to assess the relevant damages. Instead, in his submissions, the court can and should evaluate whether the claim should be raised in the first place based on the plaintiff’s own allegations.
6. Order 62, rule 5(1)(e) of the RDC states:-

“(1) The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account – (*L.N. 153 of 2008)*

(e) the conduct of all the parties; *(L.N. 153 of 2008)*”

1. Rule 5(2)(a) of the same Order states:-

“(2) For the purpose of paragraph (1)(e), the conduct of the parties includes –

(a) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;”

1. Mr Ho submits that it is the court’s responsibility to exercise its discretion as to costs and ensure that the case is expeditiously and cost-effectively dealt with. Assessing whether it is reasonable for the plaintiff to raise the present claim falls under such scope and can be done by considering the best-case scenario for the plaintiff according to the pleaded case.
2. Mr Ho further submits that assuming all evidence is in favour of the plaintiff, such that her injury was caused by picking up the bin (the best-case scenario), it is still an everyday task that an adult without any disabilities can perform.
3. I agree with Mr Ho’s submissions on this.
4. I find there was simply insufficient evidence for the plaintiff to pursue her common law claim when she issued the writ and/or serving the statement of claim (“SOC”). When the Pre-Action Offer was made, the plaintiff and her solicitors should have known the factual and legal basis of the common law claim and they certainly have sufficient materials before them to carefully consider and to decide whether to accept the offer or not. However, the plaintiff failed to provide any plausible explanation for her rejection of the Pre-Action Offer. Instead, she chose to issue the present proceedings on a very weak factual foundation, alleging negligence and breach of duty on the part of the defendant which have allegedly caused her injury when there was hardly any evidence to support her claim.
5. Only 6 months later the plaintiff accepted the Sanctioned Payment, which I note is only at 1% of what she has initially claimed under the statement of damages (“SOD”). By that time, a lot of unnecessary costs had already been incurred. The plaintiff attributed her change of mind to her declining mental health condition during this period. I do not find that to be a valid reason since stresses and the effects they have on one’s mental condition are experienced by all litigants, not to mention the fact that there is no contemporaneous medical report/evidence to substantiate this claim of hers.
6. Based on the above, with respect to the plaintiff’s legal representatives, it appears to me that this is a classic case of a non-legal aided plaintiff who wishes to “fly a kite” and to test the waters of whether the defendant (or its insurer) would be prepared to pay her more than what she had already been fairly compensated for by way of employees’ compensation (“EC”) (in this case at HK$280,000) in a work related accident.

*A common problem in work related accidents*

1. All experienced personal injuries (“PI”) lawyers would know the fundamental difference between that of a no-fault, statutory based and expeditiously processed EC claim provided under the Employees’ Compensation Ordinance, Cap.282 and that of a common law claim where the plaintiff bears the burden of proof to establish there was negligence and/or breach of implied terms of the contract of employment and/or breach of statutory duties on the part of the employer. Just because an accident happened in the course of employment and arising out of the employment, it does not necessary mean that a claimant will have a case against the employer in a common law action. In each case, the claimant bears the burden of proof to show, on a balance of probabilities, that the accident occurred due to some fault(s) or breach of duties on the part of the employer.
2. In recent years, I find there exists an unhealthy trend in PI litigation in Hong Kong where in a lot of the cases, the claimants would, most probably with the help and encouragement of their legal advisers, issue parallel common law proceedings alongside with the EC proceedings (whether at the same time or shortly after the settlement of the EC actions), when there is no sound factual or legal basis to support any breach of duties or not. Often, they will just hold the common law claim at bay while pursuing the EC claim. And when the EC claim is about to be settled or going to trial, the claimants’ lawyers would then suddenly bring up the common law claim for case management or trial, incurring a lot of unnecessary (and often duplicated) costs in the process.
3. Such practice in my view is unhelpful and making PI litigation, particularly for those smaller claims in the District Court, unnecessarily prolonged and over costly. In some of those cases, there is hardly any evidence to support the accident was caused by the negligence and/or breach of duties on the part of the employer, whether contractual or statutory. And in those cases where there is good and solid evidence to pursue the common law claim, instead of prosecuting the claim with due diligence, the claimants (and their lawyers) would rather “park” the cases on one side and wait until the conclusion of the EC claims before they would continue to pursue the common law claim, resulting in a lot of unnecessary and duplicated costs.
4. Both the EC Judge and I find such practice rather unsatisfactory. Parties are now requested to declare if they have any parallel/related common law proceedings arising out of the same work related accident at an early case management stage of the EC proceedings. The court will now bring up and deal with these claims by way of direction hearings, case management conferences or pre-trial review hearings in order to make sure that the EC and common law claims arising out of the same work accident will be dealt with expeditiously and without parties having the need to incur duplicated and unnecessary costs. The court will also try to make sure that those cases will be prosecuted in a time-efficient and costs-effective manner, in order to achieve the underlying objectives of the Civil Justice Reform.

*The evidence to support the common law claim in this case*

1. In my judgment, the evidence to support a common law claim at the time of issuance of the Pre-Action Letter by the plaintiff in this case was at best tenuous and at worst non-existence.
2. The following is a summary of how the plaintiff had described the Accident *prior to* issuing of the writ in this case.
3. 6 days after the Accident, the plaintiff signed an incident report on 18 April 2018 (“the Incident Report”) to describe how she was injured:-

“本人是日上班時間是八點正，本人於七時五十到中心廚房更換衣服後便進行浸洗蔬菜工作，先洗旺菜，逐包於放在地上的菜籬提取打開，把旺菜放入兩個鋅盆進行浸洗工作，完成清洗旺菜後便洗白菜。浸洗第一輪白菜，便進行第二輪。當第二輪白菜正在浸的時候，本人從身後取那個空菜籬欲叠在近廚房後門口旁的三個已叠好空菜籬上，但因已叠好的三個菜籬在最高一格放了裝菜的膠袋和少許垃圾，*於是我在身後取了一個空菜籬放在三個巳叠好空菜籬旁，便躬身向三個已叠好空菜籬最頂的空菜籬取裝菜膠袋和少許垃圾之時，背部脊椎骨尾位突然有像針刺痛*，我便到廚房後門外靠牆站，期望可舒緩一些，不久，工友陳敏上班經過，便向本人了解甚麼事，之後問本人是否需協助扶入內休息，本人告知不用，但請陳敏搬開仍放在地上那一個空菜籬，以免阻礙陳敏進入廚房。” [emphasis added]

1. In the plaintiff’s affirmations to support the Summons, the plaintiff did not dispute that she had signed the Incident Report. She also did not suggest that the contents of the Incident Report were wrong.
2. The plaintiff commenced the EC Action against the defendant resulting from the Accident. According to the application (which was confirmed by a statement of truth signed by the plaintiff on 28 March 2019), the Accident took place under the following circumstances:-

“On 12th April 2018, while in the course employment with the Respondent, the Applicant was assigned to work the morning shift. Since there was generally not enough working space at H.K.S.K.H. Tsz Wan Shan Day Care Centre for the Elderly (“the Scene”), the Applicant had to lift and move different objects around due to the limited working space at the Scene.

At about 08:30 hours, the Applicant bent down in order to pick up a huge vegetables container so as to remove the rubbish inside (“the Vegetable Bin”). *As the Applicant bent down, her waist and back were severely injured*, such that the Applicant could not even stand right up afterwards (“the Accident”).” [emphasis added]

1. The plaintiff was examined by orthopaedic experts jointly appointed by the parties on 19 August 2019. The orthopaedic experts recorded the plaintiff’s description of the Accident as follows:-

“39. Madam Chan volunteered a history of being involved in an injury on 12 Apr 2018 passed 8 am. *She was bending forward to lift a basket of garbage about 5kg in weight, when she felt sharp piercing pain on her back upon getting up.* 　She said there was also bilateral lower limb numbness down to toes.” [emphasis added]

1. However, by the time when the plaintiff commenced the present proceedings, it is clear that the plaintiff has tried to embellish her claim by adding some new factual elements to her case in order to support her common law claim.
2. The plaintiff issued the writ of the present proceedings on 1 April 2021 and filed the SOC on 14 April 2022. In §§16 and 17 of the SOC, the plaintiff pleaded that:-

“16. At the material time, each empty Bin weighed approximately 5kg, measuring 24 inches in length, 17 inches in width and 12 inches in height. As for the top Bin that contained the Rubbish Bag with refuse inside, its weight would be approximately 10kg.

17. At about 08:30 hours on the date of the Accident, the plaintiff *intended to bend down to pick up the top Bin with the Rubbish Bag inside which was measured about 1.5 feet tall from the floor* (as it was stacked on top of the other 3 emptied Bins). In the course of doing so, the plaintiff sprained and/or injured her waist and back in a severe manner (the “Accident”).” [emphasis added]

1. In the affirmation filed on 25 October 2022, the plaintiff said that she had injured her back severely while “washing and handling on her own some 4 big-size bins (around 24 inches in length, 17 inches in width and 12 inches in height) of vegetables.” The plaintiff did not mention the fact that she had lifted the bins.
2. Hence, even if one accepts the plaintiff’s case at its highest, ie that she had lifted a bin of 10kg for a short time (which I very much doubt was the case in view of her previous accounts), this is in my view no more than a simple common daily task which we undertake all the time, just like doing a household chore or undertaking a simple lifting task in the office. This does not by itself indicate any breach of common law duty on the part of the employer: see for example *Li Wai Kin v Ready Chance Limited*, unreported, HCPI 466 of 2008 (Chung J; 27 April 2010) at §§29-31.
3. Thus, based on the plaintiff’s own allegations as of the date of the Pre-Action Letter, it is clear in my judgment that there was no or hardly any factual foundation for the plaintiff to make the claim that the Accident was due to any breach of common law or statutory duties on the part of the defendant.
4. In this case, I find that the plaintiff, or at least those advising her, knew well that there was no or hardly any factual basis for her to make a common law claim. Yet the plaintiff insisted to proceed with the present proceedings after the Pre-Action Offer was made by the defendant on 30 December 2020. The plaintiff then became rather desperate when the defendant refused to move from the Pre-Action Offer position at all since the date when it was made. This can be seen during the without prejudice negotiations between February 2021 and May 2022 when the plaintiff was, through no less than 5-6 letters, willing to accept a sum of HK$125,000 from the originally asking sum of HK$550,000, to settle the common law claim (which was net of the EC payment of HK$280,000). Despite of the defendant’s very firm stance on the matter, the plaintiff saw fit to issue the writ, file and serve the SOC and SOD in this case, incurring much unnecessary costs in the process.
5. I should note here also that the plaintiff had tried to apply for legal aid on 8 March 2022 which caused the case to be automatically stayed until 31 May 2022. Unsurprisingly, her legal aid application was refused by the Director of Legal Aid on 20 June 2022.
6. Based on the above, I have no doubt that the plaintiff’s case will bound to fail even if the court takes her claim to its highest. In my view, there is no need for the court to go into assessing the credibility of the witnesses based on the witness statements, discovered documents, etc. in this case at all.
7. However, before I leave this issue, I would like to distinguish the present case from a recent decision of mine in *Tsang Mei v Hospital Authority*, unreported, DCPI 469/2021 (Andrew Li; 11 May 2023) that the defendant’s counsel tries to rely on in §24 of his skeleton to support the proposition that a preliminary view can be formed before commencement of proceedings in the absence of any witness statements, discovery of documents and expert evidence.
8. I respectfully disagree with Mr Ho on this.
9. In *Tsang Mei*, the key issue was whether it is just for the plaintiff to discontinue the trial and not be liable for the defendant’s costs of the proceedings by way of the court granting leave to the plaintiff to accept the sanctioned payment 3 years out of time.
10. In *Tsang Mei*, I formed the preliminary views on the liability of the case since there were sufficient materials at the pre-trial review stage for me to do so. However, in this case, I would agree with Mr Ip for the plaintiff that there were simply insufficient materials for the court to form such a view.
11. The main difference in the present case is that the court does not need to form a preliminary conclusion on the claim based on all the witness statements, discovered documents, etc., it can simply rely on the plaintiff’s own accounts in relation to the Accident. Thus, even taking the plaintiff’s allegations at its highest, I am of the view that there was simply insufficient evidence for the plaintiff to commence a common law claim against the defendant. As such, in my judgment, her common law claim is bound to fail.

1. *Identical Offer Point*
2. I am of the view that the amount stated in the Pre-Action Offer and the Sanctioned Payment are materially identical even when including their respective costs, since the costs resulting from the acceptance of the Sanctioned Payment at HK$10,000 are expected to be taxed at a rate similar to those recoverable at the Small Claims Tribunal, namely, of minimal value in this case as no legal representatives (hence no lawyers’ costs) will be allowed for proceedings in the tribunal.
3. The Master in §§36 and 37 of the Decision held that the Pre-Action Offer (HK$10,000 all-inclusive offer) and the Sanctioned Payment (HK$10,000 with a warning to vary the costs order *nisi*) were different since the court should take into account the terms regarding costs instead of merely looking at the face value.
4. Unfortunately, I find myself not able to agree with the Master on this.
5. It is undisputed that costs entitlement is built into the calculation of the sanctioned offer once it is accepted under O22 r 20 of the RDC, and that both the amounts of Pre-Action Offer and Sanctioned Payment should be evaluated with their costs. I agree with Mr Ip in §35 his skeleton that in the present case, the Pre-Action Offer was inclusive of costs while the Sanctioned Payment was not.
6. But the term “Identical Offer Point” in my view is misleading. As the defendant correctly identified in §27 of his skeleton, the law does not require the pre-action offer and the sanctioned payment to be identical in all aspects for the defendant to be able to seek costs, as seen in *Wong Ka Chi v Cheung Li Glass Engineering Co Ltd and* Another, unreported, DCPI 2013/2014 (Andrew Li; 24 March 2015) where the offer and the sanctioned payment were held to be in identical terms despite the differences in costs. The fundamental test is whether the amounts are so materially identical that it amounts to an exceptional circumstance justifying a departure from the *prima facie* rule in O 22 r 20(1) of the RDC.
7. I accept the defendant’s submissions that the Sanctioned Payment and the Pre-Action Offer inclusive of costs are materially identical, since even the most favourable costs order upon acceptance of the former would not be materially better than the latter in theory.
8. In *Ku Suet Yu, Amy v J.V. Fitness Limited Trading as California Fitness*, unreported, HCPI 266/2015 (Master Roy Yu; 5 February 2016) cited by the Master in §36(f) of the Decision, the plaintiff argued that the Pre-Action Offer was not identical to the Sanctioned Payment since the proceedings were brought in the High Court and she must be entitled to taxation at the High Court scale, and in fact the costs were likely to be taxed at the District Court level since the Sanctioned Payment amount was within the jurisdiction of the District Court.
9. In his skeleton submissions, Mr Ip for the plaintiff relied on another recent judgment of mine in *Alam Zafar v Cheuk Fung Engineering Company Limited*[2022] 5 HKLRD 978 at §40-43 to emphasize that the test in determining the scale of costs is whether at the time of the commencement of action, it is reasonable for the plaintiff to have commenced the claim in the District Court instead of in the Small Claims Tribunal.
10. In *Alam Zafar*, it was held that the plaintiff’s claim was more appropriate to be tried in the District Court even though the sum was within the jurisdiction of the Small Claims Tribunal. But I have to point out that the case was highly fact-specific, and was decided upon the unique circumstances of that case.
11. In my judgment, the present case can be distinguished from *Alam Zafar* with the following features:-
    1. the amount of HK$10,000 offered in the present case is much lower than the awarded sum in *Alam Zafar* (at HK$63,340);
    2. the Pre-Action Offer and the Sanctioned Payment had already been made in this case but not in *Alam Zafar*; and
    3. the facts of the accident in *Alam Zafar* were so heavily disputed that the main crux of the issue of liability involved the credibility of each parties’ witnesses. In this case, the main dispute in fact is whether the plaintiff injured her back from lifting the basket. But as mentioned above, the plaintiff’s claim is insubstantial even when all evidence is in favour of her and liability can already be determined. No lawyers are required to argue such matters at a trial, unlike in *Alam Zafar.*
12. In my view, based on above and applying the principle in *Ku Suet Yu, Amy*, the plaintiff’s costs are likely to be awarded at a level similar to those recoverable at the Small Claims Tribunal, which is likely to be minimal as identified by the defendant in §32 of his submissions since (i) groundwork was all completed in the EC Action; and (ii) any extra steps by the time of the Pre-Action Offer would be the pre-action letter, which cannot be claimed at the Small Claims Tribunal scale under Practice Direction 18.1. This leads to a minimal difference in the amounts of the Pre-Action Offer and the Sanctioned Payment, which is negligible under the *de minimis* rule.
13. In fact, by proceeding with the claim, the plaintiff has incurred further substantial costs by issuing the writ, preparing the SOC, SOD and filing and serving of all those documents which would far exceed the HK$10,000 she later was willing to accept out of time some 6 months after the Sanctioned Payment was made. I see no reason to why the plaintiff should not have accepted the Pre-Action Offer in the first place. I also see no reason why she should not take the consequences on costs by choosing to accept the Sanctioned Payment (which amount is exactly the same as that of the Pre-Action Offer) 6 months out of time.

*CONCLUSION*

1. In summary, based on my above findings, I am of the view that the plaintiff should bear the costs after 27 January 2021, when she should have accepted the Pre-Action Offer since (i) her claim has a very weak factual basis which in my view bound to fail; and (ii) the Pre-Action Offer is materially identical to the Sanctioned Payment.

*Order made*

1. In the aforestated premises, I would allow the defendant’s appeal and set aside the Master’s Order dated 2 May 2023 and substitute that with the following:-
   1. §49(1) of the Decision be set aside and varied to the extent that:-
      1. The defendant do pay the plaintiff the costs of this action up to and inclusive of 27 January 2021, to be taxed if not agreed on the scale similar to those recoverable at the Small Claims Tribunal; and
      2. The plaintiff do pay the defendant the costs of this action from 28 January 2021, to be taxed if not agreed at the District Court scale; and
   2. The costs of this appeal (including the costs of the Summons before the Master) be paid by the plaintiff to the defendant, with certificate for counsel, to be taxed if not agreed.
2. I make the above costs order on a *nisi* basis. In the absence of any application to vary the same by the parties within 14 days, the costs order will become absolute.
3. It remains for me to thank counsel on both sides for their helpful submissions.

( Andrew SY Li )

District Judge

Mr Chris Ip instructed by Messrs Au Yeung, Cheng, Ho & Tin, for the plaintiff

Mr Leon Ho instructed by Messrs Zhong Lun Law Firm LLP, for the defendant